Muhammad Zakwan bin Zainuddin v Public Prosecutor and other appeals

HIGH COURT (TAIPING) — CRIMINAL APPEAL NOS MT AB-42S-18–11 OF 2018, MT AB-42H-23–11 OF 2018, MT AB-42S-20–11 OF 2018 AND MT AB-42S-1–01 OF 2019
MUNIANDY KANNYAPPAN JC
29 NOVEMBER 2019

Criminal Procedure — Appeal — Appeal against conviction and sentence — Whether charge defective — Whether sessions court judge misdirected herself on the facts and law — Whether appellants prejudiced — Whether victim a competent and credible witness — Whether SCJ had taken into account the right and relevant consideration in sentencing

This was an appeal against the conviction and sentence where the four appellants were convicted of rape of a victim who was 15 years and ten months old at the time of incident. The victim was raped by six individuals in succession The victim identified only four individuals, who were the appellants. The first three appellants were sentenced to eight years' imprisonment and the fourth appellant was sent to Henry Gurney School and to be there until he attains age of 21 years. All the four appellants were charged in court separately. The prosecution then applied for all the four cases to be tried jointly pursuant to s 170(1) of the Criminal Procedure Code ('the CPC'). The fourth appellant, who was a child, age 16 years old at time of offence, was tried together with the three other appellants pursuant to s 83(4) of the Child Act 2001. The sessions court judge ('the SCJ') found the three appellants guilty and convicted them, and also found the fourth appellant guilty, on the following grounds: (a) credible and reliable evidence by the victim; (b) the victim's demeaner as to mode and manner in which she carried herself in court during testimony; (c) positive identification of the four accused persons; and (d) mere denial of the four accused persons. The appellants argued that the SCJ had misdirected herself on the facts of law and that the charge preferred was bad in law as it as it did not correspond with s 375(g) of the Penal Code ('the PC').

Held, dismissing the appeal:

(1) The argument that the charge was bad in law did not hold water, the victim was below 16 years old and the issue of whether sexual intercourse took place with or without her consent was immaterial. The appellants were not prejudiced, since the substantive offence of rape was still committed if the child victim was under 16 years of age, with or without her consent. With regards to the fourth appellant, the prosecution was in

A full compliance with the law and the fourth appellant had not suffered any prejudice or injustice. Therefore, he will be sent to Henry Gurney school until he attains the age of 21 years (see paras 55, 60 & 62).

(2) It was apparent from the record, that the victim understood the sanctity and effect of the oath taken. She knew of the effect of not telling the truth in the witness box. The victim was a competent and credible witness. By virtue of the appropriate questions asked and the correct answers given by the victim, her competency was not in doubt for the court to opine otherwise, thus the court was justified when it ruled that she was a competent witness to the dastardly crime on her (see paras 65–66).

(3) As identification of the appellants came from the victim's own senses of sight as to the ordeal she had to succumb to, which fell within s 60 of the Evidence Act 1950. Further, the procedure pertaining to the ID parade had been complied with in the present case (see paras 77 & 79).

(4) The SCJ had properly directed herself on the burden and standard of proof applicable on the facts and circumstances of the case. She had in mind, s 173(h)(iii) of the CPC at the end of the case for the prosecution as well as s 173(m)(i) and (m)(ii) of the CPC at the conclusion of the trial when the appellants were tried for the charge against each one of them (see para 82).

(5) The appellants defence was a mere denial. There was overwhelming evidence of the victim to show that she was raped by the four appellants. Hence, the evidence by the four appellants which was a pure de4nial, had failed to raise any reasonable doubt on the prosecution case. The combined weight of evidence led to only one conclusion, the victim was raped by the four appellants. The judgment of the SCJ was rooted on a well-founded basis. As such, an appellate intervention was unjustified (see paras 84 & 86).

(6) The SCJ had taken into consideration the right and relevant factors prevalent in the case involving the four appellants. She was mindful of the fact that the first and third appellants were youthful offenders, hence *laporan sosial* was ordered to be produced and considered. With regards to the fourth appellant, who was a child, a probation report was in fact produced in court before sentence was passed on him, in accordance to s 83(4) of the Child Act 2001. The sentence meted out on the fourth appellant was in accordance with s 91(1)(f) of the Child Act 2001 (see paras 88–90).

(7) The sentence meted out was fair and just according to the facts and circumstances of the case. It was also proportional to the seriousness of the crime committed, so as to promote justice for the victim and ensured public confidence in the justice system. The SCJ had given anxious consideration to the aims of sentencing; aggravating and mitigating

factors; public interest as well as the proportionality of the sentence juxtaposed with the crime committed. Therefore, appellate intervention was unjustified with regards to the sentence meted out (see paras 98–100).

[Bahasa Malaysia summary

Ini merupakan rayuan terhadap sabitan dan hukuman yang mana keempat-empat perayu telah disabitkan atas kesalahan rogol seorang mangsa yang berusia 15 tahun sepuluh bulan di waktu kejadian. Mangsa telah dirogol oleh enam individu secara bergilir-gilir. Mangsa hanya mengecam empat individu yang merupakan perayu-perayu. Perayu pertama hingga ketiga dihukum dengan tempoh penjara selama lapan tahun dan perayu keempat telah dihantar ke sekolah Henry Gurney sehingga usia 21 tahun. Keempat-empat perayu telah dituduh secara berasingan di Mahkamah. Pendakwaan telah memohon agar kesemua kes tersebut didengar secara bersama selaras dengan s 170(1) Kanun Tatacara Jenayah ('KTJ'). Perayu keempat, yang merupakan seorang kanak-kanak, berusia 16 tahun sewaktu kejadian, telah dibicarakan bersama dengan tiga perayu lain selaras dengan s 83(4) Akta Kanak-Kanak 20011. Hakim mahkamah sesyen ('HMS') mendapati ketiga-tiga perayu bersalah dan mensabitkan mereka dan juga mendapati perayu keempat bersalah, atas alasan berikut: (a) keterangan kredible dan boleh dipercayai oleh mangsa; (b) tingkah laku mangsa mengenai cara dia mengendalikan dirinya di mahkamah semasa memberikan keterangan; (c) pengecaman positif keempat-empat tertuduh; dan (d) penafian semata-mata keempat-empat tertuduh. Perayu menghujahkan bahawa HMS tersalah arah atas fakta dan undang-undang dan pertuduhan yang dikemukakan adalah salah disisi undang-undang kerana ianya tidak menepati s 375(g) Kanun Keseksaan ('KK').

Diputuskan, menolak rayuan:

(1) Hujahan bahawa pertuduhan adalah salah disisi undang-undang tidak boleh ditampung, mangsa berusia dibawah 16 tahun dan isu sama ada persetubuhan berlaku dengan atau tanpa izinnya adalah tidak material. Perayu tidak terprejudis, memandangkan kesalahan substantif rogol tetap berlaku sekiranya mangsa kanak-kanak berusia dibawah 16 tahun, dengan atau tanpa keizinannya. Berkenaan dengan perayu keempat, pendakwaan menepati undang-undang dan perayu keempat tidak mengalami apa-apa prejudis atau ketidakadilan. Oleh itu, dia akan dihantar ke sekolah Henry Gurney sehingga dia berusia 21 tahun (lihat perenggan 55, 60 & 62).

(2) Adalah jelas daripada rekod bahawa mangsa memahami kesucian dan kesan sumpah yang diambil. Dia memahami kesan tidak bercakap benar dalam kandang saksi. Mangsa adalah seorang saksi yang kompeten dan kredible. Berdasarkan soalan-soalan sesuai yang ditanya dan alasan yang

betul yang diberikan oleh mangsa, kelayakannya tidak diragui untuk mahkamah berpendapat sebaliknya, oleh itu mahkamah mempunyai alasan yang kuat apabila memutuskan bahawa dia merupakan saksi yang kompeten berkenaan dengan kesalahan yang dilakukan terhadapnya (lihat perenggan 65–66).

(3) Atas sebab pengecaman perayu datang daripada deria penglihatan mangsa sendiri berkenaan dengan perkara yang berlaku terhadapnya, ianya terjumlah dibawah s 60 Akta Keterangan 1950. Lanjutan itu, prosedur berkenaan dengan kawad cam dipatuhi dalam kes ini (lihat perenggan 77 & 79).

(4) HMS telah mengarahkan dirinya dengan betul atas beban pembuktian yang terpakai berdasarkan fakta dak keadaan kes. Dia telah memikirkan, s 173(h)(iii) KTJ di akhir kes pendakwaan dan s 173(m)(i) dan (m)(ii) KTJ diakhir perbicaraan apabila perayu dibicarakan atas pertuduhan terhadap setiap seorang daripada mereka (lihat perenggan 82).

(5) Pembelaan perayu merupakan penafian kosong semata-mata. Wujud keterangan yang amat besar dari mangsa untuk menunjukan bahawa dia telah dirogol oleh keempat-empat perayu. Oleh itu keterangan dari keempat-empat perayu adalah penafian kosong semata-mata, dan gagal untuk menimbulkan apa-apa keraguan munasabah atas kes pendakwaan. Berat keterangan keseluruhan hanya membawa kepada satu kesimpulan bahawa mangsa telah dirogol oleh keempat-empat perayu. Penghakiman HMS berasaskan alasan yang kukuh. Oleh itu, tiada justifikasi untuk campur tangan rayuan (lihat perenggan 84 & 86).

(6) HMS telah mengambilkira faktor yang relevan dan betul dalam kes melibatkan keempat-empat perayu. Dia sedar bahawa perayu pertama dan ketiga merupakan pesalah muda, oleh itu, laporan sosial diarahkan untuk dikemukakan dan dipertimbangkan. Berkenaan dengan perayu keempat, yang merupakan kanak-kanak, satu laporan akhlak telah dikemukakan di mahkamah sebelum dia dijatuhkan hukuman, selaras dengan s 83(4) Akta Kanak-Kanak 2001. Hukuman yang dijatuhkan terhadap perayu keempat adalah selaras dengan s 91(1)(f) Akta Kanak-Kanak 2001 (lihat perenggan 88–90).

(7) Hukuman yang dijatuhkan adalah berpatutan dan adil berdasarkan fakta dan keadaan kes. Ianya juga setimpal dengan keseriusan kesalahan yang dilakukan untuk memastikan keadilan kepada mangsa dan memastikan keyakinan orang awam dalam sistem keadilan. HMS telah memberikan pertimbangan kepada matlamat hukuman, faktor pemberatan dan mitigasi kepentingan awam dan juga sama ada hukuman tersebut adalah setimpal apabila dibandingkan dengan kesalahan yang dilakukan. Oleh itu, tiada justifikasi untuk satu campur tangan rayuan berkenaan dengan hukuman yang dijatuhkan (lihat perenggan 98–100).]

Cases referred to

Augustine v PP [1964] 1 MLJ 7 (refd)
Balasingham v PP [1959] MLJ 193 (refd)
Dato Mokhtar bin Hashim v PP [1983] 2 MLJ 232, FC (refd)
Heng Aik Ren Thomas v PP [1998] 3 SLR 465, CA (refd)
Jaafar bin Ali v PP [1998] 4 MLJ 406, HC (refd)
Jayaraman & Ors v PP [1979] 2 MLJ 88 (refd)
Kee Lik Tian v PP [1984] 1 MLJ 306 (refd)
Lim Guan Eng v PP [1998] 3 MLJ 14, CA (refd)
Mat v PP [1963] 1 MLJ 263 (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Muthusamy v PP [1948] 1 MLJ 57 (refd)
Pendakwa Raya v Joachim Selvanathan and Others [2009] MLJU 748, HC (refd)
PP v Jafa bin Daud [1981] 1 MLJ 315 (refd)
PP v Ling Tee Huah [1982] 2 MLJ 324 (refd)
PP v Mardai [1950] 1 MLJ 33 (refd)
PP v Sarjeet Singh & Anor [1994] 2 MLJ 290, HC (refd)
R v Hayes [1977] 1 WLR 234, CA (refd)
R v Ipeelee (2012) 1 SCR 433, SC (refd)
R v Jones (Terence) [1992] Crim LR 365, CA (refd)
R v Mei (1989) 4 CRNZ 580, CA (refd)
R v Ryan [1992] Crim LR 187, CA (refd)
Rameshwar v The State of Rajasthan AIR 1952 SC 54, SC (refd)
Somwang Phatthanasaeng v PP [1992] 1 SLR 850 (refd)
Syed Abu Tahir a/l Mohamed Esmail v PP [1988] 3 MLJ 485, HC (refd)
Tukiran bin Taib v PP [1955] 1 MLJ 24 (refd)

Legislation referred to

Child Act 2001 ss 83(4), (4)(a), (4)(b), 90(17)(a), 91, 91(1)(f)
Criminal Procedure Code ss 2, 112, 112(2), (3), (4), (5), 152(2), (4), (5), 170(1), 173(h)(iii), (m)(i), (m)(ii), 282(d), 293, 293(a), (b), (c), (d), (e), 295(1)
Evidence Act 1950 ss 9, 60(1), 118, 133A, 145(1), 146A, 146A(a), (b), (c), 155(c)
Federal Constitution art 145(3)
Penal Code ss 375(g), 376(1), (2), (2)(a), (2)(b), (2)(c), (2)(d), (2)(e), (2)(f), (2)(g), (2)(h), (2)(i), (2)(j), (2)(k)

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Hasyuntantee bt Khalil (Deputy Public Prosecutor's Office, Kuala Kangsar) for the respondent.

Muniandy Kannyappan JC:

THE CASE

[1] This criminal appeal pertains a rape case where the victim who was 15 years ten months old (below 16 years of age) at the time of incident, is Jannah (full name not mentioned as she was a child at the material time) was raped by six individuals in the early hours of 4 March 2017, at a rented house in Sungai Siput. She was led to a room where she was raped by six individuals in succession. Four individuals have been charged and convicted of the crime by the Sessions Court, Kuala Kangsar.

[2] The four are Muhammad Zakwan bin Zainuddin (Zakwan, first appellant/accused, SD1), Muhammad Muzaffar bin Taharin (Muzaffar, second appellant/accused, SD2), Syed Ismail Arif bin Sayed Suhaimi (Boboy, third appellant/accused, SD3), and Aiman (full name not mentioned, as he is a child — fourth appellant/offender, SD4). The first three appellants were sentenced to eight years' imprisonment and the fourth appellant was sent to Henry Gurney School and to be there till he attains age of 21 years. Against the conviction and sentence, the appellants had appealed. The prosecution too had appealed against sentence with regard to the second appellant (Muzaffar), but did not pursue.

[3] The other two, Muhammad Shah Iskandar (Shah Iskandar, SD5) and Muhammad Hafikri bin Abdullah (Hafikri, SD6) were not charged.

[4] All the four appellants/accused (to be used interchangeably throughout this judgment) were charged in court separately. The prosecution then applied for all the four cases to be tried jointly pursuant to s 170(1) of the Criminal Procedure Code (Act 593), ('the CPC'). This is justified, as the offence of rape by each of the appellants were committed in the same transaction, since it was on the same date, at the same place and involving the same victim, who was raped in succession by each one of them. Thus, there is found the features of proximity of time, place, continuity of action as well as unity of purpose and design (see the case of *Jayaraman & Ors v Public Prosecutor* [1979] 2 MLJ 88).

[5] The fourth appellant, Aiman, is a child, age 16 years old at time of offence, was tried together with the three other appellants. This is justified pursuant to s 83(4) of the Child Act 2001 (Act 611). It specifies that a charge made jointly against a child and a person who has attained the age of eighteen years shall be heard by a court other than a court for children, like the sessions court at Kuala Kangsar.

EVENTS LEADING UP TO THE MEET UP WITH BOBOY, THE THIRD APPELLANT, SD3

[6] The victim, SP1, had earlier in the evening before the rape had gone out for a movie with her friend. After the movie at around 11.30 pm she was sent home by her friend. However, on reaching her home the house was locked. She then contacted her adopted sister, Norashikin bt Roslan (Shikin, also SD7) for the keys. Shikin told Jannah to meet her at *Bulatan Meru* in Ipoh. She was sent to *Bulatan Meru* by another friend as the person who sent her home earlier was unable to send her to Meru.

[7] When they arrived at *Bulatan Meru,* Jannah met Shikin at the place. Shikin said that she did not have the house keys as they were with her parents. Shikin then asked her friend to take Jannah to while away time before she got the keys to the house. The man Boboy, then took Jannah to Ipoh to watch illegal racing. They all left in a group and it was already 1am in the morning. They watched the race for about an hour, before the police arrived at the illegal racing scene. The spectators of the race scampered and rode away from the scene. Initially, they were in a group but Boboy broke away from them and headed towards Sungai Siput. Jannah noticed that they entered a village named *Kampung Sungai Buloh*, written on an archway leading to the village.

[8] They arrived at a terrace house at around 2.30am and Jannah noticed that there were two motorcycles parked in front of the house and there was a cabinet outside the house too. The house was dark and they entered the house via the back entrance. Jannah did not want to go in but she was asked to by Boboy. The second appellant, Muzaffar (SD2), was already at the house.

THE RAPE

[9] Below is a narrative of the rape on Jannah and significant points of each encounter:

The third appellant — Boboy, SD3

[10] Jannah entered the house and went into a room where she lay on a mattress. Then Boboy laid next to her and soon had his hands on her breasts. There was some resistance on her part, but Boboy went on with the sexual act of penetration and subsequent ejaculation based on Jannah's account of the incident. Jannah was very observant, being aware of the sexual act of penetration and that he had ejaculated on her and she wiped the semen off with the bedsheet. It was also Boboy who took away Jannah's clothes and handphone.

[11] She noted the condition of the room, for instance the bedroom door did not have a knob and had a latch on the inside and outside of the door. She was able to positively identify the third appellant, Boboy, obviously, as he was the first person that she had met at *Bulatan Meru* and had taken her on his motorcycle to Sungai Siput. He was identified as the second accused in court during trial and at an identification parade held.

The first appellant — Zakwan, SD1

[12] After Boboy left the room, a second man, Zakwan entered the room. The man laid next to Jannah and enquired if she was all right. Jannah replied that she was not and wanted to go home. Zakwan ignored her answers and proceeded to rape her and ejaculated on her stomach. He left the room after the sexual act. Jannah was able to identify him as he had spoken to her and when he was in the room, the light from the kitchen enabled Jannah to have a clear view of Zakwan. She described him as a rather dark-coloured skin individual with short hair and round eyes. He was identified as the first accused in court during trial and at an identification parade held.

The third man

[13] When Zakwan left the room, a third man entered the room. This man had wanted Jannah to perform fellatio on him, but she refused. Jannah also noted that he was unable to have an erection, but still had partial penetration with Jannah. He left the room when called out by his friends to hurry. Unfortunately, Jannah was unable to identify the third man during the identification parade.

The second appellant — Muzaffar, SD2

[14] Jannah described the fourth man to enter the room was a big-sized man. She continued to say that the room was quite bright then, as the sun was rising and there was light coming from the kitchen too. Jannah was crying and pleaded to the man not to rape her. It was around this time that Jannah said that she wanted to have a bath. She was given a towel and this man showed her the bathroom. In the bathroom, Jannah noticed that she was bleeding. When she returned to the room Jannah also claimed that Muzaffar had threatened to kill her if she told anyone about the incident. She had screamed and heard a voice from outside the room telling her to keep quiet. She was raped and Muzaffar had ejaculated on her. This was a vivid description of the incident, with clear recollections of her going for a bath, aware that she was bleeding, her scream and the threat made to her by Muzaffar. She could clearly identify him as he was the person who showed her the bathroom. He was identified as the third accused in court during trial and at an identification parade held.

The fourth appellant — Aiman, SD4

[15] The fifth man to rape her was Aiman. He had entered the room and requested her for sex. He told her that he would be the last one. Jannah claimed that Aiman had put on a condom and had sex with her. She was able to see Aiman clearly as the room was bright and could describe him well. She only knew that he was called Aiman after he texted her a few days after the rape. Pursuant to this, she had named him in the police report (P3) lodged by her on 18 May 2017. He was identified as the fourth offender in court during trial, who was seated outside the dock (as he was a child) and at an identification parade held.

The sixth man

[16] Another man entered the room after Aiman had raped Jannah. According to Jannah, she was already weak and the man continued to spread her legs and penetrated Jannah. The man left the room and he left the room door ajar. After this, Jannah fell asleep. She was unable to describe or identify this man, as at that point of time she was worn-out.

POST-RAPE EVENTS

[17] During examination-in-chief of Jannah, she recounted that after the sixth man had left the room, she fell asleep. When she awoke, Boboy, Zakwan and Aiman entered the room. It was 9–10am and Jannah knew this, as she had asked the time from the men. Jannah said that she had her bath again and requested for her clothes and handphone. With her handphone, she texted on WhatsApp to Shikin, to take her home. It was also in the room that she had eaten Maggi mee. Later, Boboy was on a video call with Shikin. During the video call, Boboy had also pointed the phone at Jannah.

[18] Jannah had requested that Shikin took her home but she was told that someone else would pick Jannah up later. The men at house were unable to send her home on the pretext that there was no motorcycle at that time. Eventually, Shikin had her friend to pick up Jannah. Jannah was accompanied by Aiman to a meeting point (Petron) where she met the man whom Shikin had asked to fetch Jannah home.

[19] Among the notable points after the rape were that Jannah had her bath, eaten Maggi mee, the video call took place and arrangements were made to send Jannah home. All these points were also put forth by the men, with the only difference was that the Maggi mee was eaten in the room instead of the living room as claimed by the men. There was also testimony by them, stating that they were unsure that Jannah had her bath at the house.

[20] Moving away from the immediate post events of the rape, the following day, Aiman texted Jannah about a silver bracelet which belongs to her, was with Boboy. Jannah's sister (SP6) had read the message and later told her mother (SP5) about it. This message was important as it triggered the events leading to Jannah making a police report on the rape. It was because of the message that Jannah's mother had insisted that Jannah lodged a police report. The report was lodged (P3), slightly more than two months after the rape incident.

[21] A week after the rape, Boboy came to Shikin's house and apparently this was followed by more visits. In one of these visits, there occurred an altercation between Boboy and Jannah's mother about the rape. This incident was denied by Boboy where he maintained that he had never spoken to Jannah's mother at all.

THE CONVICTION

[22] The sessions court judge ('SCJ') found the three accused persons guilty and convicted them, and also found the fourth offender guilty, principally on the following grounds:

(a) credible and reliable evidence by the victim which is overwhelming;

(b) the victim's demeanour as to the mode and manner in which she carried herself in court during testimony;

(c) positive identification of the four accused persons; and

(d) mere denial from all the four accused persons.

Credibility and reliability of the victim

[23] The testimony by the victim was clear, lucid and detailed, thus her account is credible. She did not waiver or change her story although she was questioned and challenged by the defence on her evidence. Her long and vivid description of the events on that day were consistent and elaborate. The victim was able to provide description of the four men who had raped her and elaborated on the sexual acts which included the moments before and after penetration took place. More importantly, she was able to remember the sequence of the men who had raped her. It began with the:

(a) third appellant, Boboy, SD3; followed by

(b) first appellant Zakwan, SD1;

(c) an unidentified third man;

(d) second appellant Muzaffar, SD2;

(e) fourth appellant Aiman, SD4; and

(f) an unidentified sixth man.

Because of the circumstances she was in, she was unable to identify the third and sixth men who raped her. For the third man, her memory was vague as she was tired after two men had raped her. In fact, after that she had freshened up by having her bath. As for the sixth man, Jannah was too tired to observe in order to have identified him.

[24] The victim was able to provide details of the place where the rape took place in a house in Sungai Siput. The astute description included details of the sexual acts, especially the penetration by the men, the arrangement of the room, her bodily positions, and the changing and direction of light in the room as the rape took place from the early hours in the morning to sunrise. This can only mean that she was in the room and went through the ordeal.

[25] The emphasis here is that Jannah who had not met any of the four appellants before, was able to identify them, both at the identification parade and in court during trial. In this regard the SCJ who had the advantage of audible evidence, had summed up succinctly in her judgment on the credibility and reliability of the victim in the following terms:

> [15] Di dalam kes ini saksi utama adalah mangsa kejadian sendiri iaitu SP1. SP1 telah memberi keterangan secara bersumpah di mahkamah. Semasa memberi keterangan di mahkamah, mangsa telah pun berumur 17 tahun dan saksi ini juga sedang belajar di sebuah kolej di dalam jurusan berkaitan operasi sistem computer. Selain itu sebagai hakim perbicaraan saya berpeluang meneliti kredibiliti saksi ini di sepanjang tempoh beliau memberi keterangan di mahkamah. Saya dapati saksi dapat mengingati dengan jelas kejadian yang berlaku. Keterangan yang diberikan adalah terperinci dan tidak tersangkut-sangkut terutama apabila menceritakan siapa lelaki-lelaki yang telah merogolnya dan juga apabila menggambarkan keadaan di tempat kejadian. Oleh itu saya berpendapat saksi ini adalah saksi yang credible dan keterangannya boleh dipercayai. Sekiranya mangsa mereka-reka atau mengada-adakan cerita, sudah pasti dia tidak akan dapat memberikan keterangan dengan terperinci bagaimana kejadian persetubuhan itu boleh berlaku. Mahkamah juga dapati mangsa tidak goyah, menggelabah dan keterangannya tetap sama dan utuh dengan keterangan yang diberikan semasa pemeriksaan utama walaupun mangsa disoal dan dicabar berkali-kali oleh peguambela.

[26] In sum total, it can be concluded that the victim's evidence is reliable and she has emerged as a credible witness. The reliability of the evidence is demonstrated by the same response which she had afforded in open court at every point of questioning, which is akin to a clock which tells the time accurately.

Contradictions and inconsistencies in evidence by the appellants/accused persons

[27] There were contradictions with the witness statements made by the

accused persons and their testimony in court. All the four accused persons had made conflicting statements and from this, it can be gathered that their story was made up and as the SCJ had surmised that it appeared to be an afterthought on their part.

[28] On the eventful night, the rape by the four men did take place with each one of them going into the room separately. Hence, their account of what allegedly transpired in the living room where they supposed to be chatting, using their handphones and watching television did not hold water, leading to conflicting accounts of events in the living room.

[29] There were however events which did take place that were reported by the men and Jannah. For instance, Jannah had her bath and when they all had *Maggi mee* later that morning. These incidents were also narrated by Jannah but in differing contexts. For the men, Jannah had her bath because she had the smell of smoke on her and in Jannah's case, she took her bath after the third man had raped her and also later in the morning after the ordeal. On this score, some of the accused persons were also not sure if this took place.

The first appellant — Zakwan, SD1

[30] Contradictory evidence by Zakwan on the points whether Jannah had her bath and Muzaffar had cooked *Maggi mee*. In his witness statement he had stated that Jannah had her bath but when re-examined by defence, he said that he did not know.

The second appellant — Muzaffar, SD2

[31] He had stated in his defence that Shah Iskandar (SD5) had borrowed Boboy's (third appellant) motorcycle as his motorcycle had a tyre problem. This differed from the statement from the others where they stated that Shah Iskandar had borrowed Muzaffar's (second appellant) motorcycle. He also did not state that Shah Iskandar and Hafikri (SD6) had sex with Jannah.

The third appellant — Boboy, SD3

[32] Contradictory evidence by Boboy, wherein in his witness statement, he had said that Muzaffar was the only person in the house when he arrived there with Jannah. However, on cross-examination, he replied that Muzaffar and Shah Iskandar were in the house. In his statement, there was no mention that Shah Iskandar and Hafikri had entered the room and had sex with Jannah. During cross-examination, Boboy said that his motorcycle was at the house and Shah Iskandar did not borrow it, but in the statement, he said that it was borrowed by Shah Iskandar, hence he was unable to send Jannah home. Also

there were contradictions on the time Jannah went home. When questioned by the deputy public prosecutor ('DPP'), he replied, she returned home in the afternoon, but in his statement, it was stated in the morning, around 8–9am. In his statement too, he had said that he was accused by Jannah's mother for *'makan anak saya'* but when asked by the DPP, he replied that he had never met Jannah's mother at all. The SCJ had noted the demeanour of accused in hesitating to reply when questioned by the DPP about his interaction with Jannah's mother.

The fourth appellant — Aiman, SD4

[33] He contradicted on whether Jannah had her bath or otherwise at the house. In his statement, he was sure that she had, while when questioned in court he said that he was unsure of this.

[34] All the accused persons, save for Aiman had stated that Shah Iskandar and Hafikri did come by the house and invited them to watch illegal racing in Ipoh. None of them wanted to go as they claimed. After that Shah Iskandar and Hafikri left for Ipoh. What is pertinent here is that there was no mention of Shah Iskandar (SD5) and Hafikri (SD6) having sex with Jannah before they left for Ipoh. Only Aiman had reported that they had sex with Jannah, but he was unsure of the sequence.

Denial by the appellants/accused persons

[35] All of them denied they had raped Jannah. Their accounts of the incident did not match the evidence given by the victim. There are loopholes in their witness statements and testimonies in court which could mean that they made up the events to cover the rape. Certain elements such as, Jannah having her bath and all of them eating the *Maggi mee* did happen, only the time and place these took place differed.

[36] Their defence has been a mere denial of the rape on SP1. When denying the factum of rape, they have attempted to paint a neutral picture of the timing of events on the day in issue when SP1 was with them. They tried cleverly to state that they were aware as to her presence at the abode but they just chatted with her, allowed her to have her bath, provided her with a meal of noodles. Other than that, all of them had stated they fell asleep after the chat and left the scene after that. It was only Aiman, the fourth appellant, who had stated that he saw SD5 and SD6 entered the room where SP1 was in, to have sex with her, but he did not witness the sexual act. As for the timing when they left the place; who cooked noodles for SP1; and who had borrowed whose motorcycle in order to leave the place; were riddled with inconsistencies and contradictions. Such inconsistencies and contradictions do not augur well for them as it does

not in any way fortify their defence of mere denial but in fact lends credence to the case of the prosecution vide evidence of the victim SP1, rendering it to be intact and unrebutted by the defence.

[37] Their only consistency with the testimony of SP1 is Boboy's (SD2) subsequent conduct to speak to Shikin (SD7) and inform her that SP1 wishes to go back home. This is further confirmed by Aiman (SD4) who had escorted her out of the house to the place where the friend of SD7 had fetched SP1. Hence the defence advanced by the four appellants does not dislodge the case of the prosecution (see the case of *Public Prosecutor v Ling Tee Huah* [1982] 2 MLJ 324).

[38] Thus the SCJ has not misdirected herself, when she decided that the defence was an afterthought by all four accused persons. Juxtaposed with the overwhelming evidence by SP1, it is apparent. When concluding so, the SCJ has also considered all relevant factors, including credibility and demeanour of SP1 as well as positive identification of each and every one of them by SP1.

MEDICAL EVIDENCE

[39] SP7, Dr Haema, a paediatrician at Hospital Raja Permaisuri Bainun, Ipoh and SP8, Dr Nilawati, an obstetrics and gynaecology expert from the same hospital testified. SP8, stated, upon physical examination of Jannah on 23 May 2017 found that she had two old hymen tear. The size of the tear was wide *(lebar)*. The doctor described the tear as such from 1–5 and 8–11 o'clock (see P16), and the tear could be attributed to the penetration of a blunt object, like penis. The conclusion that examination and findings are conclusive of sexual abuse in the medical report (P15) further fortifies the findings made by SP7 and SP8.

BAD CHARACTER EVIDENCE

[40] The attempt by the defence to paint the victim as a person with loose character was weak. The screenshots of Jannah's WeChat where she is alleged to have had suggestive pictures with remarks that she offered sexual services in return for money is inadmissible pursuant to s 146A of the Evidence Act 1950 (Act 56).

[41] The attempt by the defence is to use it as an overriding framework to put forth that Jannah was promiscuous and the rape on her was her own doing given this background. It is a fact that Jannah was a child and she had been sexually taken advantage of by the four accused persons. Considering the fact that there is no possible way to verify that the pictures were from her, although

the WeChat account belonged to her and that there was no tempering done by others, (see IDD5; IDD13 (A–H)), it remains inadmissible as it also contravenes s 146A. Moreover, the fact that the victim SP1, testifying at the trial, even for the sake of argument, has a generally immoral character and the intention of the accused persons to introduce as their defence that she was likely to have consented to sexual intercourse is irrelevant and inadmissible for the purposes of impeaching her credibility, as she is a child below 16 years of age, and as to whether the sexual intercourse was with or without her consent, is immaterial under the law (see s 375(g) of the Penal Code, Act 574 ('the PC')).

[42] Section 146A deals with the restriction on the evidence and the questions that may or may not be asked in a rape trial, like the present case. The provision renders it impermissible to tender evidence or ask questions concerning the sexual activity of the complainant with any other person, other than the accused. The exceptions to the rule are laid down in s 146A(a), (b) and (c), which is inapplicable to the present case. Section 146A would encompass a situation in the present case wherein, the offer of sexual services as alleged could be to persons, other than the accused persons, hence such evidence is inadmissible. The offer of sexual services by her, as alleged could not possibly be made to the four appellants, as the unfolding of the narrative clearly shows that she was brought into the house by Boboy, SD3, confined in the house, her clothes taken away from her, then the four appellants had satiated their lust over her and finally allowed to go home. The narrative does not sync with an offer (willingly) for sexual services by SP1 to them.

[43] In the premise, their defence falls as a pack of cards. What is left is the factum of rape, which is denied too. The appellants cannot be blowing hot and cold, on one hand stating that SP1 allowed the sexual intercourse with them and on the other hand stating that the rape on her did not take place. Their denial of the rape too, falls as a pack of cards, on the face of the positive and overwhelming testimony of SP1, which remains unrebutted till end of the defence case. It is also stark that the crime committed on SP1 is statutory rape.

THE IMPEACHMENT

[44] In his witness statement, Shah Iskandar (SD5) claimed that he had picked up Hafikri (SD6) and had gone out. At about 3.30am on the said date they stopped by at the rented house. There he met Jannah at the house. He and Hafikri chatted with Jannah and later Jannah invited them to have sex. Shah Iskandar and Hafikri admitted having sex with Jannah in the room. After they had sex, he and Hafikri left for *Bulatan Meru*.

[45] Shah Iskandar had stated that his friends, Zakwan, Boboy and Muzaffar were asleep in the living room, except for Aiman who was awake.

[46] Hafikri's (SD6) witness statement was the same as Shah Iskandar, which essentially states that they had met Jannah at the house, chatted with her and later were invited to have sex with her. After sex, they rested for a while in the living room to have a smoke. Then, they left for *Bulatan Meru.*

[47] Under cross-examination, SD6 admitted he had lewd chat with Jannah and Jannah had asked him and SD5 to have sex. He declined and asked Shah Iskandar to enter the room with Jannah. After Shah Iskandar, Jannah invited Hafikri for sex in the room. He too claimed that his friends Zakwan, Boboy and Muzaffar were asleep in the living room during that time.

[48] Both Shah Iskandar and Hafikri's witness statements were brief and identical which opens questions to its reliability.

[49] An impeachment proceeding was pursued against SD5 and SD6, premised on their previous inconsistent statement, each one of them had made to the police under s 112 of the CPC. The 112 statement (see P17 and P18), was put to them in cross-examination to challenge their credit if the inconsistency will affect their credibility as witnesses for the defence. In court both testified to paint a picture to the court that, only both of them had sex with SP1, whereas the other four appellants have got nothing to do with SP1. By doing so they had in fact made an attempt to fortify the denial by the four appellants of the rape on SP1.

[50] But in their respective 112 statement, pursuant to the parts revealed to form the subject matter of the impeachment proceeding, it is apparent that they both have given clear details on the sequence of their turn together with the four appellants, when they raped SP1. In fact, the sequence syncs with SP1's testimony. But on impeachment, they both had stated in their explanation, that the statement was procured under threat and force. This allegation was rebutted successfully by the prosecution when the DPP had called the recording officer, Khairul Fikri bin Mat Rani as well as the succeeding Investigation Officer, Mohamad Faiz bin Mohamad. Hence their credibility stands impeached, as they have flatly contradicted in their testimony in open court under oath. It is noteworthy that, even for the sake of argument, both SD5 and SD6 were threatened or forced to give a 112 statement, the said threat and force would not extend, for the recording officer to force them to state the sequence of the men who had raped the victim. The statement pertaining sequence of the men who had raped SP1, can only come from their own memory, as they were there at the scene of crime when the rape took place.

[51] Furthermore, statement made by them under s 112 of the CPC, is fortified by built in safeguards under the law. The statement has to be the absolute truth, and if otherwise they can be prosecuted for perjury; they have

the liberty to refuse to answer any questions put to them or to make a statement if the effect would be self-incriminating them. They have been told of it before the recording takes place. Additionally, they have the opportunity to correct their statement if they wish to, before placing their signature on it so as to allow any corrections to be made. Hence if they had reservations (be it threatened, forced) on the content of their statement to the recording officer, they could have corrected themselves (see s 112(2), (3), (4) and (5) of the CPC). This obviously did not take place. In that regard, the SCJ has correctly embarked on the impeachment proceeding which was anchored on their 112 statement.

[52] An express ruling on impeachment could have been made at the conclusion of trial, when there was finding of guilt and conviction of the three accused persons and finding of guilt of the fourth offender, who is a child. The SCJ instead, made the ruling only in her grounds of judgment. I view this as not fatal, as the express ruling which is made in the judgment is followed by an explanation and assessment as to why she had impeached the credibility of SD5 and SD6 as defence witnesses for the accused persons. The ruling made only in the grounds of judgment does not constitute an error of law or procedure. The use of the 112 statements to impeach the credit of SD5 and SD6, was part of the cross-examination by the prosecution and it does not call for any special ruling at that stage (see the case of *Somwang Phatthanasaeng v Public Prosecutor* [1992] 1 SLR 850). Moreover, it has not prejudiced the appellants, as the ultimate ruling is contained in the judgment. Suffice to say, that the SCJ had painstakingly followed the impeachment exercise step by step whereby, she had made a ruling on the material contradiction preceding the impeachment proceeding, confirmed that the 112 statement was recorded from SD5 and SD6, followed by questioning of both SD5 and SD6 and thereafter they were given their right to be heard before being judged on their credibility, by explaining their basis for contradiction. In that regard, the impeachment proceeding is procedurally compliant (see s 145(1) read together with s 155(c) of Act 56; *Dato Mokhtar bin Hashim v Public Prosecutor* [1983] 2 MLJ 232 (FC); *Muthusamy v Public Prosecutor* [1948] 1 MLJ 57). In the premise, the rejection of their testimony ab initio is justified.

[53] With the rejection of the testimony of SD5 and SD6, whom had purportedly supported the explanation by the four appellants, there is only left the denial by the four accused persons, SD1, SD2, SD3 and SD4. But, what is plain and obvious is the credible, overwhelming and substantive evidence of the victim, SP1, against the four appellants, thus strengthening the charge against them.

A THE APPEAL

[54] Before me, however, the conviction has been attacked on a number of grounds. In sum total, the defence counsel had argued that the SCJ had misdirected herself on the facts and law when convicting the first three appellants and finding the fourth appellant guilty.

B

THE CHARGE

[55] It was contended by the defence, in effect, that the charge against the appellants is bad in law, as it does not correspond with s 375(g) of the Penal Code (Act 593) ('the PC'), which entails that rape which took place with or without the consent of the victim, ought to be mentioned in the charge. This argument does not hold water, as s 375 of the Penal Code, describes what constitutes an offence of rape under the law. Section 375(g), specifically, refers to the situation whereby, if the victim is under age, below 16 years old, as in the present case, the issue as to whether the sexual intercourse did take place with or without her consent is immaterial. This is so as the law forbids sexual intercourse with a minor. Thus if sexual intercourse takes place on a victim, who is a child below 16 years old, it is deemed to be statutory rape.

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[56] Further s 152(2) of the Criminal Procedure Code (Act 593) ('the CPC'), provides that if the law which creates the offence gives it any specific name (like rape on the facts of the present case), then the offence may be described in the charge by that name only, which is exactly what the prosecution has done. Since the description of the offence is found in s 375 of the PC, it is not necessary for the prosecution to further state details as found in that provision. Reference to the offence as rape, suffices.

F

[57] Moreover, as provided for in s 152(5) of the CPC, the fact that the charge made is equivalent to a statement that every legal condition required by law to constitute the offence charged, which is statutory rape in the present case, has been fulfilled. Hence, when the prosecution has deemed it fit to prefer charges of rape against the four appellants on a child victim, who is below 16 years of age (specified in the charge), each and every legal condition constituting an offence of statutory rape under s 375(g) of the PC, is made out. The element of consent is never a material ingredient to be proven by the prosecution, since s 375(g) of the PC dictates that it is an offence per se to have sex with a minor, as in the present case.

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[58] After having made reference to s 376(2)(e) of the PC, in comparison with , it was argued that the appellants have been prejudiced as the charge preferred against the appellants does not state whether the sexual intercourse with SP1, took place with or without her consent. It was contended that

s 376(2)(d) of the PC is triggered only when rape is committed on a victim under 16 years of age, without her consent, thus the issue of consent is relevant, whereas in s 376(2)(e) of the PC, which specifies that whoever commits rape on a victim who is under 12 years of age, with or without her consent, shall be punished, thus the issue of consent is irrelevant. In this regard, the defence had argued that the appellants are entitled under the law to advance defence of consent by SP1, the victim, when the sexual intercourse took place.

[59] Surveying s 376(2) of the PC, it is stark that the provision caters for instances of aggravated rape which is punishable with an enhanced penalty (from that under s 376(1) of the PC). It is aggravated rape, because s 376(2)(a) to (2)(k) of the PC specifies instances which are extreme circumstances under which the offence of rape is committed. This includes rape on a victim who is under 16 years of age, without her consent, which is punishable with a minimum period of ten years' imprisonment and maximum period of 30 years' imprisonment and whipping. However, the offence of rape involving a minor, under 16 years of age, with or without her consent, is covered by s 375(g) of the PC and punishment for that offence is provided for under s 376(1) of the PC, as in the present case.

[60] The appellants are not prejudiced, since the substantive offence of rape is still committed if the child victim is under 16 years of age, with or without her consent. For that reason, the prosecution has also decided to prosecute the appellants for the offence of rape on the victim, SP1, who was 15 years ten months old, thus punishable under s 376(1) of the PC.

[61] The prosecution has also deemed it fit to prosecute the accused persons under s 376(1) of the PC, premised on the *viva voce* evidence available. This is *in tandem* with the powers of the public prosecutor exercisable at his discretion, pursuant to art 145(3) of the Federal Constitution. It is apparent, that rape had taken place on the victim who was a minor at the material time, forced with sexual intercourse by the four accused persons in succession. It is force and against her will, as the victim was brought to the house where she was confined, her clothes and handphone taken away, leaving her helpless, before they satiated their lust over her, one by one. Thus, rape has been committed on a minor who is under 16 years old, which is punishable under 376(1) of the PC. Moreover, the defence is not precluded from raising the defence of consent, which they did, but the facts and circumstances of the case, as well as the evidence available (as alluded to in the course of this judgment), does not support such a defence.

[62] On the charge too, as for the fourth appellant, involving a child, it is contended that the punishment applicable for a juvenile is not stated in the charge. It is trite, pursuant to s 152(4) that the law and section of the law

against which the offence (the punishment provision) is said to have been committed shall be mentioned in the charge. The prosecution has stated the offence of rape committed by the fourth appellant is punishable under s 376(1) of the PC. But since the fourth appellant, at the material time of finding of guilt and sentence is a juvenile, the sentence meted out against him has to be in accordance with s 91 of the Child Act 2001 (Act 611). It is apparent that the court is fully aware of the applicable sentencing provision to this particular appellant. The probation report prepared by the Social Welfare Department officer alludes to the same, when reference is made to s 91(1)(f) of Act 611. The fourth appellant who was represented by counsel at the material time is fully aware of the provision, as plea in mitigation was also directed to that provision. With all that, the prosecution has been in full compliance with the law and the fourth appellant has not suffered any prejudice or injustice. Indeed, he has been sent to Henry Gurney school till he attains the age of 21 years.

CHILD EVIDENCE AND THE NEED FOR CORROBORATION

[63] In criminal cases, like present, children are competent to give unsworn testimony even though they do not understand the nature of the oath, so long as they are possessed of sufficient intelligence to justify the reception of evidence and understand the duty of speaking the truth (see s 133A of the Evidence Act 1950 (Act 56)). The question whether a child has the necessary intelligence will be determined by the judge. Children who understand the nature of an oath are competent to give sworn testimony. The test is whether the child has sufficient appreciation of the seriousness of the occasion and a realization that taking the oath involves something more than the duty to tell the truth in ordinary day to day life: *R v Hayes* [1977] 1 WLR 234.

[64] It is trite as how to deal with a child witness and the rules of evidence applicable are explicit. The law is found in s 118 of the Evidence Act 1950 (Act 56) which prescribes all persons, including a child, are competent to testify, unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions. Thus, the trial judge has to determine a child's competency to testify by ensuring that she understands the oath she takes. If she is able to understand, then the child may pursue with her testimony. If she is unable, then the trial will proceed with her unsworn testimony.

[65] The child must be able to differentiate between telling the truth and untruth in court and if she is untruthful, what could be the consequence. In that regard, a sieve through the questions posed to SP1, in this case by the DPP during examination-in-chief demonstrates that she is fully aware that she is testifying in court and know that she has to speak the truth. In cross-examination, she has testified that she knows of the effect of not telling

the truth. It is apparent from the record, that SP1 understands the sanctity and effect of the oath taken. She too knows of the effect of not telling the truth in the witness box. The effect of the oath taken by SP1 is strengthened by her steady and vivid testimony. The trial judge was convinced of SP1's competency, thus she was allowed to testify. Premised on those factors, SP1 is both a competent and credible witness. The answers rendered by her is commendable as she could very well recollect what has happened to her with no uncertainty. This coupled with her consistency in testimony which only leads to the conclusion that her evidence is rightly accepted and admitted by the trial judge.

[66] By virtue of the appropriate questions asked and the correct answers given by SP1, the competency of SP1 is not in doubt for the court to opine otherwise, thus the court is justified when it ruled that she is a competent witness to the dastardly crime on her (see the case of *Rameshwar v The State of Rajasthan* AIR 1952 SC 54; *Kee Lik Tian v Public Prosecutor* [1984] 1 MLJ 306).

[67] There is no rule of law that in sexual offences the evidence of the complainant must be corroborated. But if the evidence of the victim is unusually convincing, it would be safe to convict. The SCJ arrived at the conclusion after combing through the evidence of the victim with a fine tooth comb wherein she had, mentioned in details each strand of evidence of SP1, before she concluded that she is both credible and reliable. Based on the credible evidence of the victim, the SCJ has concluded that there is no reason for SP1 to falsely accuse the accused persons. This is found as a fact by the SCJ after considering the evidence in totality (see the case of *Public Prosecutor v Mardai* [1950] 1 MLJ 33).

[68] It would of course be illogical to expect corroborative evidence of the ordeal the victim has suffered throughout the wee hours of the morning on 4 March 2017, as it was her presence alone, confined, with the six men and nobody else. Hence what kind of independent evidence is expected in such a situation. This is where the SCJ has aptly found the following:

> [14] Sememangnya di dalam kes-kes kesalahan seksualamat sukar untuk mencari saksi bebas yang melihat sendiri kejadian kerana kes-kes persetubuhan/perhubungan seksual selalunya akan dilakukan oleh OKT di tempat yang secara sulit atau bersembunyi dari pengetahuan orang lain. Oleh itu bagi membantu mahkamah di dalam membuat keputusan, mahkamah perlu meneliti semua keterangan yang dikemukakan oleh pihak pendakwaan dan juga keterangan-keterangan senyap yang lain seperti gambar-gambar dan dokumen-dokumen sokongan seperti laporan perubatan.

[69] To that end, the medical evidence proffered by SP7 and SP8, supported by P15 and P16, as alluded to above, is to be regarded as strong independent and corroborative evidence of the sexual abuse which had befallen the victim, SP1. In the case of *Syed Abu Tahir a/l Mohamed Esmail v Public Prosecutor* [1988] 3 MLJ 485, it was decided that on a charge of statutory rape (as in the present case), where lack of consent is irrelevant, medical evidence showing any fresh tear in the hymen may be sufficient to corroborate the evidence of the victim on the factum of rape. In the present case, it is not a minor tear, but a wide tear from 1–5 and 8–11 o'clock (see P16), which in fact syncs with the ordeal SP1 has gone through.

[70] The other piece of corroborative evidence in this case is the police report, P3, lodged by SP1. There have been accusations hurled that it was in fact a report lodged at the behest of her mother SP5. But the fact remains that it consists of allegations of rape which has befallen her, and it would be only her who could tell the police as to the ordeal she has suffered in the hands of the six men. Her mother had only advised her to lodge the said report. She has been so honest when she admitted at that point of time that she could only identify the fourth appellant, Aiman, as he had messaged her (as alluded to above) after the incident, and not the others. The names of the others were not known to her, as for all intends and purposes, they were strangers. It was only at the Identification parade and in court during trial, she could positively identify them as the men who had raped her in succession. Although the police report was lodged late, after about two months plus, she had an explanation for it. Her explanation was that she was traumatised by the ordeal and only after her sister SP6 had sighted the message sent by Aiman (SD4), which her mother SP5 came to know of it subsequently, then she lodged the said report, after the mother had told her to do so. This does notamount to any motive on her part to wrong the appellants, but it is her reaction to the whole episode that had led her to behave in that manner. The delay has been sufficiently explained by SP1 in her testimony, which stands unrebutted and I do not see any reason why it should not be accepted. P3 also serves as corroborative evidence pursuant to s 157 of the Evidence Act 1950 (see the case of *Lim Guan Eng v Public Prosecutor* [1998] 3 MLJ 14).

IDENTIFICATION OF THE APPELLANTS/ACCUSED PERSONS

[71] Since the sexual intercourse with the victim was in succession by six different men, evidence as to their identification by the victim is paramount. It cannot be lacking. It is emphasised that the victim's evidence of identification which forms part of the prosecution case is based on her recollection which is of good quality (see the case of *Heng Aik Ren Thomas v Public Prosecutor* [1998] 3 SLR 465). In this regard the SCJ has also found the following:

[20] Mahkamah seterusnya merujuk kepada keterangan mangsa semasa perbicaraan berkenaan identiti lelaki-lelaki yang telah merogolnya. Mangsa bukan saja dapat mengecam OKT-OKT semasa proses kawad cam di balai polis tetapi juga di mahkamah. Keterangan-keterangan mangsa jelas menunjukkan bahawa mangsa dapat mengenalpasti setiap lelaki yang telah merogolnya pada tarikh dan masa kejadian memandangkan mangsa berada di rumah itu dalam masa yang lama iaitu dari waktu malam sehinggalah ke siang hari keesokan harinya. Oleh itu mahkamah berpuas hati bahawa mangsa telah dapat mengecam setiap lelaki yang merogolnya dengan baik iaitu OKT-OKT yang telah dituduh di mahkamah bagi kes ini. Mangsa mengatakan terdapat 6 lelaki yang telah merogolnya pada tarikh kejadian tetapi mangsa memang tidak dapat mengecam lagi dua orang lagi lelaki yang merogolnya kerana memang dia tidak nampak wajah mereka kerana pada masa itu dia sudah berada dalam keadaan lemah dan tidak sihat oleh itu dia membiarkan sahaja perlakuan dua lelaki yang lain itu kepadanya. Sekiranya mangsa berniat untuk menganiaya OKT-OKT tentu dia akan mengatakan bahawa dia juga mengecam dua lelaki lain yang merogolnya walaupun dia tidak melihat mereka. Oleh itu mahkamah berpendapat keterangan mangsa adalah boleh dipercayai dan bukan sengaja dibuat untuk menganiayai atau memfitnah OKT-OKT. Lagipun OKT-OKT bukanlah orang yang pernah dikenali oleh mangsa sebelum ini sehingga menyebabkan mangsa berdendam ataupun ingin melakukan sesuatu yang buruk kepada mereka. Malah hari kejadian adalah hari pertama mangsa bertemu dengan OKT-OKT ...

[72] The above finding by the SCJ is premised on the weight of evidence available. When Boboy (the third appellant — SD3) raped her, the room was not dark, so she could see him clearly. He was with her for an hour. He was the one who ferried her to the house. He took away her clothes and handphone and left the room after the sexual connection with her. An inference could be drawn here, that by doing so, he had paved the way for the remaining men to satiate their lust on her, which in fact took place as such, as she was crying for her clothes to be returned.

[73] As for Zakwan (the first appellant — SD1), she could describe him so well, as to his sharp features. He had spoken to her for about half an hour before the sexual intercourse with her.

[74] She is able to identify the third appellant (Muzaffar — SD3) as he showed her the washroom and provided her with a towel to freshen up. Thereafter he had use force to rape her. He had even threatened to kill her if she opens up on the episode to anyone. She could also remember him by the big size of his body.

[75] She was so clear of the fourth appellant (Aiman — SD4) as he had used a condom to have sexual intercourse with her. He had repeatedly said to her, that he would be the last one to do so. After the event he had messaged her to inform her of her bangles left behind by her at the house. In the said message,

A he had even sought apology from her as to what he did to her. He had even taken her out of the house to meet the person who is to ferry her back home. In court, she is able to describe him so well, as he was sitting outside the dock, as he is a child.

B **[76]** It is a fact that she could not identify the third and sixth men who had raped her. It is apparent from the above, that this is only expected as she was raped not by one but six men successively. After the second man (Zakwan), she was tired as she was seeking out to have a bath. Thus when the fourth man (Muzaffar) came in, he had shown her the bathroom for her to freshen up. It C only goes to show she was tired after the second sexual intercourse, considering the fact that she was not well when she came into the house from outside. Thus, she was unsure of the third man. After five men had raped her in succession, it is only natural that she was extremely tired, as she has testified, hence the non-identification of the sixth man. But the fact remains that she is able to D identify the four accused persons' in court and prior to that at the identification parade after the whole ordeal that has befallen her. Moreover, they were the four men who were at the house, after the whole incident, whom attended to her by allowing her to take her bath and providing her with noodles to eat.

E

[77] The above falls squarely within s 60(1) of the Evidence Act 1950 (Act 56), as identification of the appellants came about from her own senses of sight as to the ordeal she has to succumb to.

F **[78]** But of course the other source of supportive evidence is the identification parade (ID parade) which was conducted during the investigation phase of the case. It strengthens the prosecution's case. The ID parade is necessary in the circumstance of the case as the accused persons are not previously known to the victim (see the case of *Public Prosecutor v Sarjeet* G *Singh & Anor* [1994] 2 MLJ 290; *Jaafar bin Ali v Public Prosecutor* [1998] 4 MLJ 406). The ID parade according to the testimony of SP4, has been conducted properly so as to allow the victim, if she could, identify the appellants who were suspects at the material time. Challenge was mounted on non-compliance with the inspector general's standing orders. It has to be borne H in mind, that so long as the process and procedure adopted at the ID parade is fair and just and it has not prejudiced the accused persons, any issues raised would be meaningless. The ultimate is that the appellants who were paraded at the ID parade do not stick out like a sore thumb. The standing orders are only a guide and is not culled in stone, but to be adhered to as far as possible, as the I circumstances render it necessary.

[79] Moreover, there is no written law available on constructing an ID parade, save that it is a relevant piece of evidence in a criminal trial pursuant to s 9 of the Evidence Act 1950. The procedure pertaining ID parade which has

been complied with in the present case, syncs with the succinct summary by Vernon Ong J (as he then was, now FCJ), in the following manner in the case of *Pendakwa Raya v Joachim Selvanathan and Others* [2009] MLJU 748:

(1) All persons at the identification parade should be of the same ethnic group and same station in life as the suspect. The disparity of ages between them should not be large. The persons in the line-up need not be of exactly the same description;

(2) The identification parade must be held at the earliest opportunity and all available witnesses should be required to attend at the very first parade. Separate identification parades must be held where there are two or more suspects; *(as in the present case — the emphasis is mine).*

(3) The witnesses must not be allowed to see the suspect until the moment when everything is ready and they walk in to identify him. The witnesses must not be given prior assistance via photographs or verbal description;

(4) The suspect should be placedamong a number of persons in a row – not less than nine or ten. The suspect should be invited to stand where he pleases in the row. He may change his position after each witness has been called in. He should be asked if he has any objection to any of the persons present or to the mode of arrangement;

(5) The witnesses should be brought in one by one. Each witness who has completed the identification parade process should be kept apart from the witnesses who are yet to come;

(6) The officer in charge must ensure that the identification parade is properly and fairly conducted. He must record every circumstance connected with the identification, the names of the witnesses and their decisions as fully and fairly and carefully.

[80] Any breach of the procedural requirements in holding an identification parade does not lead automatically to inadmissibility (see cases like, *R v Jones (Terence)* [1992] Crim LR 365; *R v Ryan* [1992] Crim LR 187). If the parade is conducted fairly, which is so in the present case, a failure to comply strictly with instructions in the police orders is not fatal (see *R v Mei* (1989) 4 CRNZ 580).

[81] The outcome of the ID parade, has been that SP1 was able to identify the four appellants (as alluded to above) positively. The result of the ID parade is also borne out by exhs P11 and P12.

CONCLUSION

[82] When finding the appellants guilty of the crime and thereafter convicting the first, second and third appellant, and finding the fourth appellant guilty, the SCJ has been mindful of the burden placed on the

prosecution to prove its case beyond reasonable doubt, and the duty of the defence is merely to raise a reasonable doubt. The SCJ, by stating that, the defence was unable to raise a reasonable doubt, hence the case of the prosecution is proven beyond reasonable doubt, is obviously another way of stating that the prosecution has in fact proven the offence of rape against the appellants beyond reasonable doubt. Her finding is sanctioned by s 173(m)(i) and (m)(ii) of the CPC, and further by the direction in *Mat v Public Prosecutor* [1963] 1 MLJ 263 and *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169. Pursuant to *Mat* direction, the SCJ believed the witnesses for the prosecution, specifically SP1 and disbelieved the appellants evidence, and they have not been successful in raising a reasonable doubt on the prosecution case. Further pursuant to *Radhi* direction, the SCJ has in fact demonstrated the actual application of the test that even though she does not accept or believe the accused persons' explanation, they cannot be convicted until the court is satisfied for sufficient reasons (as alluded to above) that such explanation does not cast a reasonable doubt on the prosecution case. Thus, she has properly directed herself on the burden and standard of proof applicable on the facts and circumstances of the case. The SCJ had in mind, s 173(h)(iii) of the CPC at the end of the case for the prosecution as well as s 173(m)(i) and (m)(ii) at the conclusion of the trial, when trying the appellants for the charge against each one of them.

[83] At the end of the prosecution case, the prosecution had successfully established a prima facie case against the four accused persons, by adducing credible evidence proving each ingredient of the offence of rape (see s 173(h)(iii) of the CPC).

[84] Alluding to the defence of the accused persons, it was a mere denial. There is overwhelming evidence of the victim to show that she was raped by the four appellants. Hence the evidence by the four appellants which is a pure denial, had failed to raise any reasonable doubt on the prosecution case. The combined weight of evidence leads to only one conclusion, that is, the victim Jannah was raped by the four appellants.

[85] The grounds of decision by the SCJ has conveyed a reasoned judgment on the facts and the law, thereafter arriving at the findings and conclusions. She has arrived at correct finding of facts anchored on the available evidence before her. She had carefully considered the defence and gave valid reasons for rejecting it, as alluded to above (see salient case authorities like *Balasingham v Public Prosecutor* [1959] MLJ 193; *Augustine v Public Prosecutor* [1964] 1 MLJ 7).

[86] Premised on the above, the judgment of the SCJ is rooted on a well-founded basis. As such an appellate intervention is unjustified. In the premise, pursuant to s 316 of the CPC, this appeal is dismissed.

SENTENCE

[87] It is trite law that the sentence meted out by the court shall be in accordance with law. Hence it has to be in consonance with s 173(m)(ii) of the CPC as well as the *Jafa* direction (*Public Prosecutor v Jafa bin Daud* [1981] 1 MLJ 315) wherein, the sentence shall be within theambit of the punishment provision under the Penal Code. In this case, it has to be in accordance with s 376(1) of the PC. Section 376(1) of the PC carries a punishment which may extend to twenty years' imprisonment and whipping shall be ordered. The sentence meted out must also be assessed and passed in accordance with established judicial principles.

[88] The SCJ when passing the sentence has taken into consideration the right and relevant factors prevalent in the case involving the four appellants. She was mindful of the fact that the first and third appellants were youthful offenders, hence *laporan sosial (see P21(A), P21(B))* was ordered to be produced and considered.

[89] Further with regard to the fourth appellant who is a child, a probation report (see P22) was in fact produced in court before sentence was passed on him. In fact, the consideration of the probation report by the SCJ is mandated under s 83(4)(b) of the Child Act 2001 (see also the case of *Tukiran bin Taib v Public Prosecutor* [1955] 1 MLJ 24). Together with that, the SCJ had also sought the assistance of two advisers as required under the Child Act 2001 to advise her on the appropriate sentence to be meted out on him. This syncs with s 83(4)(a) read together with s 90(17)(a) of the Child Act 2001.

[90] After having considered the probation report on the fourth appellant, as well as the advice from the advisers, and all other mitigating and aggravating factors, the sentence meted out on the fourth appellant who is a child, has been in accordance with s 91(1)(f) of the Child Act 2001. He has been sent to Henry Gurney School, and to stay there till he attains the age of 21 years old.

[91] The sentence meted out on the first three appellants is a period of imprisonment of eight years with variance as to the date it shall take effect on them. This is consistent with s 282(d) of the CPC, which dictates that every sentence of imprisonment shall take effect from the date on which it was passed unless the court passing the sentence otherwise directs.

[92] In the premise, the sentence of imprisonment on the first and third appellant takes effect from the date of conviction, after production of the *laporan sosial* for each of them, which is on 16 November 2018 and 15 October 2018; respectively. The first appellant was 20 years old at date of conviction and the third appellant 21 years old.

[93] Together with the sentence of imprisonment, each of the three appellants were sentenced to whipping of three strokes each and for each of them to be subject to the supervision of the police for a period of two years pursuant to s 295(1) of the CPC, which is to commence immediately after the expiration of the sentence passed on them.

[94] The sentence passed on the first and third appellant is justified by virtue of s 293 of the CPC, which provides that when any youthful offender (see s 2 of the CPC, which defines, 'youthful offender' as who is of or above the age of 18 and below the age of 21), is convicted, the court has an option to either to pass a sentence of imprisonment or instead rely on s 293(a)–(e) of the CPC. The SCJ has opted to pass a sentence of imprisonment instead.

[95] As for the second appellant, who was 24 years old at the time of conviction, the same sentence is meted out by the court.

[96] The sentence meted out against the appellants is premised on the factors which is discussed below.

[97] It is anchored on:

(a) the aim of deterrence so as to punish the appellants so that they would repent and will not commit an offence again. It is also hoped that future offenders will be deterred by seeing the punishment meted out on the appellants. Hence the aim is two-fold; to deter the appellant himself from committing offences in the future, and to deter other offenders from committing the same offence, which is regarded as specific and general deterrence, respectively;

(b) by imposing the said term of imprisonment, the first, second and third appellant are also expected to be law-abiding and responsible citizen. It is hoped that incarceration on them, or *the clanging of the prison gates,* with them inside, will do them good and they would have all the time to reflect and change their behaviour and attitudes. Likewise, for the fourth appellant, when he is detained at Henry Gurney School;

(c) overwhelming consideration is the manner in which the dastardly crime has been committed by all the four appellants. The striking features being, rape in succession; victim taken advantage to satiate their lust;

victim confined in the house in the wee hours of the morning of the fateful day with clothes and handphone removed; thus leaving her to be *in communicado* with her family, relatives and friends;

(d) seriousness of the offence committed by all the four appellants which is statutory rape involving a child victim who was below 16 years old at the time of incident. Hence the intention of the Parliament when prescribing a maximum term of imprisonment of twenty years, which only reflects abhorrence, the society has on such crimes involving young victims; and

(e) public interest as the paramount consideration, being the protection of the victim and would be victims from such a despicable crime as well as for the appellants to turn from criminal ways to orderly behaviour.

[98] Hence the sentence meted out is fair and just according to the facts and circumstances of the case. It is also proportional to the seriousness of the crime committed, so as to promote justice for the victim and ensures public confidence in the system of justice. In this context the SCJ had appropriately referred to the case of *R v Ipeelee* (2012) 1 SCR 433 which decided the following:

> ... proportionality ... is not just a sanction. First, the principles ensure that a sentence reflects the gravity of the offence ... it promotes justice for the victims and ensures public confidence in the system of justice. Secondly, the principles of proportionality ensure that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender ...

[99] In arriving at a fair, just and proportional sentence on the appellants, the SCJ has given anxious consideration to the aims of sentencing; aggravating and mitigating factors; public interest as well as the proportionality of the sentence juxtaposed with the crime committed.

[100] In the premise, appellate intervention is unjustified with regard to the sentence meted out by the SCJ. Thus, pursuant to s 316(b)(ii), the sentence meted out is maintained.

> Finding of guilt and conviction under section 376(1) Penal Code, against the first, second and third appellant maintained. Sentence of 8 years' imprisonment and whipping of three strokes and order of police supervision for a period of two years commencing immediately after the expiration of the sentence passed affirmed. Finding of guilt under section 376(1) Penal Code, against the fourth appellant maintained. An order to send the fourth appellant to Henry Gurney School and to stay there till he attains the age of 21 years is also affirmed.

Appeal dismissed.

Reported by Izzat Fauzan